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April 15, 2016

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Ms. Alice Wirth  
Deputy Assistant Secretary  
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Ms. Tiffany Clemmons  
Executive Director of Specialized Services  
Baltimore City Public Schools  
200 East North Avenue, Room 204B  
Baltimore, Maryland 21202

RE: XXXXX  
Reference: #16-075

Dear Parties:

The Maryland State Department of Education, Division of Special Education/Early Intervention Services (MSDE), has completed the investigation of the complaint regarding special education services for the above-referenced student. This correspondence is the report of the final results of the investigation.

**ALLEGATION:**

On February 19, 2016, MSDE received correspondence from Ms. Amanda R. White, Esq., of the Maryland Disability Law Center (MDLC), hereafter, “the complainant,” filed on behalf of the above-referenced student. In that correspondence, the complainant alleged a violation of certain provisions of the Individuals with Disabilities Education Act (IDEA) with respect to the above-referenced student. This office investigated the allegation that the Baltimore City Public Schools (BCPS) and the Department of Labor, Licensing and Regulation (DLLR) did not provide the student with special education instruction required by the Individualized Education Program (IEP) from February 19, 2015 to March 10, 2015, in accordance with 34 CFR §300.101.

**INVESTIGATIVE PROCEDURES:**

1. On February 19, 2016, the complainant provided the MSDE with documentation to be considered.

Ms. Amanda R. White, Esq.  
Ms. Alice Wirth  
Ms. Tiffany Clemmons  
April 15, 2016  
Page 2

2. On February 22, 2016 and February 23, 2016, the MSDE sent a copy of the complaint via facsimile, to Ms. Alice Wirth, Director of Correctional Education, DLLR, and Ms. Tiffany Clemmons, Executive Director of Specialized Services, BCPS.
3. On February 24, 2016, Mr. Albert Chichester, Complaint Investigator, MSDE, conducted a telephone interview with the complainant regarding the information contained in the correspondence received in our office on February 19, 2016.
4. On February 29, 2016, the MSDE sent correspondence to the complainant that acknowledged receipt of the complaint and identified the allegation subject to this investigation. The MSDE also notified Ms. Wirth and Ms. Clemmons of the allegation to be investigated and requested that their offices review the alleged violation.
5. On March 3, 2016, Mr. Chichester conducted a telephone interview with Dr. Tina Figuero, Special Education Coordinator, DLLR, regarding the allegation contained in the complaint.
6. On March 9, 2016, the Office of the Attorney General (OAG) provided the MSDE with a written response to the allegation on behalf of the DLLR.
7. Documentation provided by the parties was reviewed. The documents referenced in this Letter of Findings include:
  - i. IEP, dated December 10, 2014;
  - ii. Correspondence from the DLLR to the complainant, dated March 9, 2016;
  - iii. Baltimore City Detention Center intake form;
  - iv. *Facilities Master Plan*, State of Maryland Department of Public Safety and Correctional Services (DPSCS), 2013;
  - v. Press Release, dated August 25, 2015, from The Honorable Governor Larry Hogan;
  - vi. Correspondence containing an allegation of a violation of the IDEA, received by the MSDE on February 19, 2016.

## **BACKGROUND:**

The student is now twenty-one (21) years old and is not enrolled in an educational program. During the period of time addressed by this investigation, he was identified as a student with an Emotional Disability under the IDEA. The student had an IEP that required the provision of special education instruction and related services.

From January 22, 2015 to March 10, 2015, the student was placed at the former XXXXXXXX (XXXX), which was a facility that housed pretrial and short-sentenced adults

and pretrial juveniles who were charged as adults<sup>1</sup> (Docs. a, b, and d).

### **FINDINGS OF FACTS:**

1. In order to determine whether educational services are to be provided to individuals placed in State facilities, the DLLR obtains information from a form completed for each individual during intake into the facilities. The form requests information about the last school attended and whether the individual received special education and related services. If the individual does not report that special education and related services were previously received, no steps are taken to verify this information and no educational services are offered (Docs. b and c).
2. At the time of the student's placement at the XXXX in January 2015, he was under an Order of Guardianship to the Baltimore City Department of Social Services (DSS). Prior to the student's placement at the XXXX, he was enrolled in the Baltimore City Public Schools (BCPS) and attended the XXXXXXXXXXXX. During that time, the student had an IEP that required that he be provided with special education and related services (Docs. a and f).
3. The written response to the State complaint that was filed on behalf of the DLLR indicates that, prior to the student's placement at the XXXX in January 2015, he had been placed at the XXXX from May 23, 2014 to July 30, 2014. During the intake process for the previous placement, the student did not report that he had received special education and related services. Therefore, no additional information was sought upon his placement in January 2015 and no educational services were offered. The written response asserts that because the student "failed to self-identify as needing special education services," this "may demonstrate that he was not interested in participating" (Doc. b).
4. The written response to the complaint that was filed on behalf of the DLLR states that the DLLR "is not considered a Local Education Agency and is not funded and supported in the same manner as the public school system." It continues, "We do not believe [the student] is owed compensatory services by DLLR nor does DLLR have the ability to provide services to students who are no longer incarcerated in a Maryland Correctional Institution" (Doc. b).

### **PRELIMINARY DISCUSSION:**

The IDEA requirements for providing a Free Appropriate Public Education (FAPE) are binding on each public agency in the State that is responsible for the education of students with disabilities. This includes Local Educational Agencies (LEAs), as well as other State agencies

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<sup>1</sup> This facility was operated by the Maryland Department of Public Safety and Correctional Services (DPSCS). The current detainees are now housed in other DPSCS facilities (Doc. e).

Ms. Amanda R. White, Esq.  
Ms. Alice Wirth  
Ms. Tiffany Clemmons  
April 15, 2016  
Page 4

(34 CFR §300.2). For students aged 18 through 21, the obligation to make a FAPE available under the IDEA extends to students who have been identified as students with disabilities in their last educational placement prior to incarceration in an adult correctional facility (34 CFR §§300.101 and .102).

In Maryland, “public agency” means LEAs, as well as State agencies including the DLLR (Md. Code Ann., Educ. §8-412 and COMAR 13A.05.01.03). The DLLR is responsible for providing special education and related services to students with disabilities who are incarcerated in State operated adult correctional institutes under the jurisdiction of the DPSCS (COMAR 13A.05.01.09).

### DLLR

Based on the Findings of Facts #1 and #2, the MSDE finds that the DLLR was the public agency with responsibility for the student’s education while he was placed in the XXXX from January 22, 2015 to March 10, 2015.

### BCPS

Based on those same Findings of Facts, this office further finds that the BCPS did not have responsibility for the provision of a FAPE to the student during this time period.

### DISCUSSION/CONCLUSIONS:

If a student with an IEP transfers to a new public agency within the State, the new public agency (in consultation with the parents) must provide the student with a FAPE, including services comparable to those described in the student’s IEP from the previous public agency, until the new public agency either adopts the IEP from the previous public agency or revises the IEP (34 CFR §300.323). “Comparable services” is defined as services that are similar or equivalent to those that are described in the IEP from the previous public agency, as determined by the IEP team in the new public agency [emphasis added] (Analysis of Comments and Changes to the IDEA, *Federal Register*, Vol. 71, No. 156, p. 46681, August 14, 2006).

In order to ensure that a student’s IEP from a previous public agency is implemented, the new public agency must implement procedures to obtain student records, including the IEP from the previous public agency. Based on the Findings of Facts #1 - #3, the MSDE finds that the DLLR did not ensure that the student’s educational record was obtained from the previous public agency upon his placement at the XXXX in order to continue to provide the student with the special education and related services required by his IEP. Therefore, this office finds that a violation occurred.

Under the IDEA, parents have specific rights, including the right to consent to and revoke consent to the provision of special education and related services (34 CFR §§300.9 and .300). A State may provide for the transfer of parental rights to students who have reached the age of majority under State law or have been incarcerated (34 CFR §300.520).

Ms. Amanda R. White, Esq.  
Ms. Alice Wirth  
Ms. Tiffany Clemmons  
April 15, 2016  
Page 5

However, in Maryland, the transfer of such rights to a student may occur only under very specific and limited circumstances. One of those circumstances is where there is documentation that the student is living outside of the parents' home and is not in the care of custody of another public agency, such as the DSS (Md. Code Ann., Educ. §8-412.1).

The public agency must appoint a parent surrogate to make educational decisions for a student with a disability under certain circumstances. These circumstances include when no parent of the student can be identified or located or when the student is a ward of the State under the laws of the State (34 CFR §300.519). Under Maryland law, a student is a ward of the State if a State or county agency has been appointed legal guardian, or the student has been committed by a court of competent jurisdiction to the legal custody of a State or county agency or official with the express authorization that the State or county agency or official make educational decisions for the student (34 CFR §300.519 and Md. Code Ann., Educ. §8-412).

Based on the Finding of Fact #2, the MSDE finds that, when the student was placed at the XXXX, he met the definition of ward of the State under Maryland law. Therefore, the DLLR was required to request that the local school superintendent appoint a parent surrogate to represent his educational interests.

Based on the Findings of Facts #2 and #3, the MSDE finds that the DLLR did not consider the required factors under Maryland law for transfer of rights at the age of majority, nor did the DLLR considered whether the student required appointment of a parent surrogate before allowing him to decide whether to continue to receive special education services. Therefore, this office finds that violations occurred.

#### **ADDITIONAL DISCUSSION:**

In resolving a complaint in which the State Educational Agency (SEA) has found a failure to provide appropriate services, an SEA must address this through corrective action appropriate to address the needs of the student (such as compensatory services or monetary reimbursement), and the appropriate future provision of services to all students with disabilities (34 CFR §300.151).

The United States Department of Education, Office of Special Education Programs (OSEP) has addressed the issue of whether this obligation continues once the student is no longer living within the jurisdiction of the public agency for which the violation occurred.

In *Letter to Whipple*, the OSEP explained that the responsibility for providing compensatory services continues to exist even when the family has moved out of State or when the child is no longer eligible to receive the services that were lost as a result of a violation of the IDEA. In such a case, reasonable efforts must be made to contact the parents to determine if they want to receive compensatory services, and if so, those services can be provided through contractual arrangements if it is not feasible for the service providers to reach the student in his or her new location (*Letter to Whipple*, 54 IDELR 262, October 27, 2009).

Ms. Amanda R. White, Esq.  
Ms. Alice Wirth  
Ms. Tiffany Clemmons  
April 15, 2016  
Page 6

Based on the Findings of Facts #1 - #4 above, the MSDE finds that the DLLR is responsible for the provision of compensatory services or other agreed upon remedy for the lack of the provision of a FAPE to the student from February 19, 2015 to March 10, 2015.

### **CORRECTIVE ACTIONS/TIMELINES:**

#### **Student-Specific**

The DLLR is required to provide the MSDE with documentation by July 1, 2016 of the offer of compensatory services or other agreed upon remedy for the student's loss of a FAPE from February 19, 2015 to March 10, 2015.

#### ***Systemic***

The DLLR is required to provide the MSDE with documentation by September 1, 2016 of the steps that have been taken to ensure the future compliance with the following requirements:

1. The educational records of students with disabilities transferring from another public agency are obtained and that the students are provided with the special education and related services required by the IEP or comparable services, as determined by an IEP team;
2. The transfer of parental rights to students under the IDEA occurs only when the criteria required by Maryland law are met; and
3. Requests are made to the local school superintendent to appoint parent surrogates as required by Maryland law, including for wards of the State.

### **TECHNICAL ASSISTANCE:**

Technical assistance is available to the parties by contacting Dr. Nancy Birenbaum, Compliance Specialist, Family Support and Dispute Resolution Branch, MSDE at (410) 767-7770.

Within fifteen (15) days of the date of this letter, the DLLR shall provide Dr. Birenbaum with the name and telephone number of the individual assigned by the public agency to serve as the contact person for the MSDE in ensuring completion of the corrective actions required as a result of this investigation.

Please be advised that both parties have the right to submit additional written documentation to this office, which must be received within fifteen (15) days of the date of this letter, if they disagree with the findings of fact or conclusions reached in this Letter of Findings. The additional written documentation must not have been provided or otherwise available to this office during the complaint investigation and must be related to the issues identified and addressed in the Letter of Findings.

Ms. Amanda R. White, Esq.  
Ms. Alice Wirth  
Ms. Tiffany Clemmons  
April 15, 2016  
Page 7

If additional information is provided, it will be reviewed and the MSDE will determine if a reconsideration of the conclusions is necessary. Upon consideration of this additional documentation, this office may leave its findings and conclusions intact, set forth additional findings and conclusions, or enter new findings and conclusions. Pending the decision on a request for reconsideration, the public agency must implement any corrective actions consistent with the timeline requirements as reported in this Letter of Findings.

Questions regarding the findings, conclusions and corrective actions contained in this letter should be addressed to this office in writing. The parties maintain the right to request mediation or to file a due process complaint if they disagree with the identification, evaluation, placement, or provision of a FAPE, including issues subject to a State complaint investigation, consistent with IDEA.

The MSDE recommends that this Letter of Findings be included with any request for mediation or due process.

Sincerely,

Marcella E. Franczkowski, M.S.  
Assistant State Superintendent  
Division of Special Education/Early Intervention Services

MEF/ac

c: XXXXXXXXX c/o Amanda R. White  
Gregory Thornton  
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